Office-Supreme Court, U.S.
FILED
SEP 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 360

AMERICAN DIETADS CO., INC.,
Petitioner,

AGAINST

ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education, and Welfare; EDWARD WARNER and CARL E. LORENTZSON,
Respondents.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MILTON A. BASS,
SOLOMON H. FRIEND,
Counsel for Petitioner,
342 Madison Avenue,
New York 17, N. Y.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WORth 2-0689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 360

AMERICAN DIETAIDS CO., INC.,

Petitioner,

AGAINST

ANTHONY J. CELEBREZZE, Secretary of the United States Department of Health, Education and Welfare, EDWARD WARNER and CARL E. LORENTZSON,

Respondents.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The respondents' brief has set forth an erroneous statement of fact as the basis for its objection to the granting of certiorari. Thus, the respondents state on the bottom of Page 1 and the top of Page 2 of their brief that the alleged question presented is:

> "1. Whether a complaint alleging that Food and Drug Inspectors used a concealed tape recorder *on a single occasion* during the course of a factory inspection provides sufficient basis for a declaratory judgment and injunctive relief *where there is no threat of another inspection.*" (Italics added.)

Contrary to the respondents' assertion, the complaint does not allege the use of a concealed tape recorder on a *single occasion.* Rather, the complaint alleges that the respondents are continuing to commit such acts. The complaint further alleges that the respondents are continuing to commit such acts, under an alleged claim of right, as standard operating procedure as a part of plant inspections.

Thus Paragraph Seventeenth of the complaint alleges:

> "SEVENTEENTH: Upon information and belief that the defendants are continuing to commit such acts as hereinabove set forth under an alleged claim of right pursuant to Section 704(a) of the Federal Food, Drug and Cosmetic Act."

Paragraph Eleventh of the complaint further alleges, in relevant part, as follows:

> "ELEVENTH: * * * That defendants Warner and Lorentzson refused to turn over the tape to plaintiff, as demanded, and advised plaintiff that it was standard operating procedure to use such equipment as part of plant inspections."

These allegations of the complaint were never denied. These allegations stand admitted upon the record before this Court.

The respondents brought a motion for summary judgment in the District Court. Their affidavits did not deny the allegation, in the complaint, that they are continuing to commit the acts therein complained of. In matter of fact, the respondents not only admitted this allegation by their failure to deny same, but they actually impliedly affirmed the charge by arguing before the District Court that the use of concealed tape recorders was pursuant to official Government agency policy.

The statement by the respondents that the complaint alleges the use of a concealed tape recorder on a single occasion, where there is no threat of another inspection, is demonstrably untrue. The very fact that the respondents had to go to such lengths as to submit a false premise for its opposition herein, underscores the reason why certiorari should be granted.

On page 4 of their brief, the respondents argue that there is "no reason to suppose that the incident in question will be repeated". The respondents have attempted to employ conjecture as a substitute for facts. The complaint alleges that such acts are continuing. That allegation has not been denied in this record.

The respondents further argue on page 4 of their brief that the Secretary of Health, Education and Welfare has told Congress that they will no longer use concealed tape recorders in factory inspections. This reference is not a part of the instant record. It was never before the lower Courts for consideration and the petitioner never had an opportunity to respond to any such assertion.

Most significantly, however, summary judgment could not have been granted in the District Court if there was an issue of fact to be adjudicated. On the contrary, both parties agreed in the District Court that summary judgment should be granted because there were no issues of fact present. There were no issues of fact because the respondents did not deny the continuing commission of the acts alleged in the complaint.

Respectfully submitted,

Milton A. Bass,
Solomon H. Freed,
Counsel for Petitioners

September 1963